IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 2ND JULY 2007 / 11TH ASHADHA 1929

AS.No. 479 of 1995()

OS.107/1993 of SUB COURT, PAYYANNUR
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APPELLANT - IST DEFENDANT:

PUTHENPURAYIL GEORGE, S/O.MATHEW,
RESIDING AT BLAKODE AMSOM,
ARAMGOM DESOM.

BY ADV. SRI.GRASHIOUS KURIAKOSE

RESPONDENTS - PLAINTIFF & 2ND DEFENDANT:
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1. CHIRAYIL JOSEPH, S/O. KURIAKOSE,
KODIYATH AMSOM PANNIKODE DESOM,
KOZHIKODE DISTRICT.

2. PUTHENPURAYIL VARGHESE, S/O.GEORGE,
BLAKODE AMSOM, ARAMGOM DESOM.

BY ADV. SRI.GEORGE THOMAS (MEVADA) R1
BY ADVOCATE SHRI B.A. JOSEPH R2

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 02/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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A.S. NO. 479 OF 1995

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Dated this the 2nd day of July, 2007

J U D G M E N T

First defendant in O.S. No.107 of 1993 on the file of the Sub Court, Payyannur is the appellant. Appeal is filed against the decree and judgment passed by the trial court by which it passed a decree allowing the first respondent-plaintiff to recover a sum of Rs.50,000/- with interest from the appellant and second defendant-second respondent.

2. The short facts necessary for the disposal of the appeal are as follows: Defendants are owners of 5.12 acres of property comprised in R.S. No.53/1A of Alakkode Village. First defendant was having title and possession over 3 acres of land and 2 acres and 12 cents belonged to the second defendant. Defendants agreed to sell the entire property for a consideration of Rs.7,20,000/- to the plaintiff and received an amount of Rs.50,000/- as advance. An agreement was executed and signed by the first defendant on 31.8.1992. It was agreed that the plaintiff will pay another 50,000/- rupees on or before 30.9.1992. According to the plaintiff he

was prepared to pay another 50,000/- rupees, but at that time second defendant took up a stand that he was unaware of the execution of the agreement and that he will not sign the sale deed. Defendants issued a notice to the plaintiff on 8.12.1992 alleging that the plaintiff failed to pay the second instalment as agreed and hence the amount of Rs.50,000/- already paid was liable to be forfeited. They also contended that they were not bound to execute the sale deed. Therefore the plaintiff filed the suit for recovery of Rs.50,000/- paid as advance with interest.

3. Defendants contented that the plaintiff committed breach of the agreement. It was contended that the plaintiff paid Rs.50,000/- as advance and agreed to pay another Rs.50,000/- on or before 30.9.1992 and balance Rs.6,20,000/- on or before 30.12.1992. It was contended that the plaintiff did not pay the second instalment and was not ready and willing to get the sale deed executed. So he lost his right to recover the amount of Rs.50,000/- paid as advance earnest money deposit.

4. The trial court, after considering the evidence, found that the defendants committed breach of the

agreement and the plaintiff was ready and willing to perform his part of the agreement. Hence the trial court ordered return of the advance money with 12% interest. Challenging that part of the decree and judgment this appeal is filed by the first defendant.

5. The fact that defendants entered into an agreement for the sale of 5.12 acres of land comprised in R.S.No.53/1A is not disputed. It is also not disputed that the first defendant-appellant had title over only 3 acres of land and the balance property belonged to the second defendant. Second defendant had also admitted that an agreement was entered into between himself and first defendant on the one side and between the plaintiff on the other. It was also admitted that on the date of agreement they received an amount of Rs.50,000/-. Though the second defendant had agreed to convey his share in the property, he had not affixed his signatures in Exhibit A1 agreement. Defendants have no case that the first defendant has entered into the agreement for and on behalf of the second defendant also. On the other hand, a reading of Exhibit A1 would show that it was intended to be signed by the second defendant also. His name

was written in all pages of the document. Second defendant did not affix his signatures in Exhibit A1. The specific case put forward by the plaintiff was that though second defendant had agreed to affix his signature, subsequently he backed out and refused to sign the agreement. The case pleaded by the plaintiff was more probable. First defendant admitted that even on the prior day of the execution of the agreement the second defendant had promised him that he will sign the document. After analysing all the facts, the trial court came to the conclusion that second defendant was not willing to perform his part of the agreement. The mere fact that there was some delay in sending reply notice by the plaintiff is not a ground to hold that it was he who committed breach of the agreement. The case of the defendants was that 50,000/- was paid as earnest money deposit and because of the failure on the part of the plaintiff to purchase the property paying the balance consideration, defendants sustained damages and as such the said amount is liable to be forfeited.

6. In Seetharama v. Abbas (1988 (2) KLT 478) this Court has held that the amount paid as part of the purchase price can be forfeited only if the contract contains

terms either express or implied. Even if such a clause is incorporated in the document, it does not mean that the person who received the amount can forfeit the entire amount. A duty is cast upon the defendants to plead and prove the actual quantum of damages sustained. It cannot be whimsical or fancy. Admittedly appellant and second respondent received a sum of Rs.50,000/- and agreed to convey the property belonging to them. The said amount was nothing but an advance towards sale consideration. The appellant had raised a contention that himself and second respondent had entered into an agreement with one Shri Kumaran Master for purchase of property utilising the balance of sale consideration and because of the failure on the part of the plaintiff to perform his part of the agreement that transaction did not take place and they sustained damages. As rightly pointed out by the trial court, no evidence was adduced in support of the above contention put forward by the appellant. So there is no evidence to prove that the appellant and second respondent sustained damages. The finding of the trial court that the defendants are liable to return Rs.50,000/- received as advance is perfectly correct. Trial

court has awarded 12% interest from the date of suit till date of decree. Trial court also awarded future interest at the rate of 12% per annum. In view of the principles laid down in Central Bank of India v. Ravindra (AIR 2001 SC 3095) plaintiff is entitled to get future interest only at the rate of 6% per annum.

7. In the result, the appeal is allowed in part. The decree and judgment passed by the trial court allowing the plaintiff to recover a sum of Rs.50,000/- with 12% interest from the date of suit till date of decree is confirmed. But the decree passed by the trial court allowing the plaintiff to realise future interest at the rate of 12% from the date of decree is modified and plaintiff is allowed to recover 6% future interest from the date of decree till date of realisation.

8. Parties are directed to suffer their respective costs.

Civil Miscellaneous Petition No.3788 of 1995 will stand dismissed.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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A.S. NO. 479 OF 1995

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J U D G M E N T

2nd JULY, 2007